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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CSX Transportation, Inc., *Petitioner,*

v.

Leonard Adams, *et al., Respondents.*

On Petition for a Writ of Certiorari
To the Louisiana Court of Appeal, Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES
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CSX TRANSPORTATION, INC., *Petitioner*,

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LEONARD ADAMS, *et al.*, *Respondents*,

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA COURT OF APPEAL, FOURTH CIRCUIT

Respondents, being the Class of plaintiffs in this Class Action, respectfully present this opposition to the petition for a writ of certiorari filed on behalf of CSX Transportation ("CSXT") to review the decree of the Louisiana Court of Appeal, Fourth Circuit, in this case.

OPPOSITION TO STATEMENT OF JURISDICTION

The Supreme Court of the United States lacks appropriate jurisdiction to review the decree of the Louisiana Court of Appeal since it is not a final judgment of the highest court of the state from which the application for a writ of certiorari is sought.

The decree of the Louisiana Court of Appeal is not a "final judgment" within the intent of 28 U.S.C. 1257(a) and Rule 10 of the Court, as interpreted in Cox Broadcasting Corp. et al. v. Cohn, 420 U.S.469, 98 S.Ct. 1029, 42 L.Ed.2d 328 (1975). The denial by the Louisiana Supreme Court of CSXT's application for certiorari or review of the Court of Appeal's decision reserved CSXT's right to reraise the question on appeal in the event of an adverse judgment. Under 28 U.S.C. 1257(a) this Court may review final judgments or decrees rendered by the highest court of a state in which a decision could be had on issue therein enumerated. Under the interpretation of this statute by the Court in Cox, *supra*, only the first of the four exceptions, enumerated and discussed therein, from the finality rule in the case of a decision by an intermediate state court could have application in this case. That exception refers to those cases "in which there are further proceedings -- even entire trials -- yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings is preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final." Cox, 420 U.S. at 477, 95 S.Ct. at 1037.

For the reasons set forth hereinbelow the federal issue is neither conclusive nor the outcome of further proceedings preordained by any final judgment in state court; hence, CSXT's petition for a writ of certiorari should be denied.

MODIFICATION OF THE STATEMENT OF THE CASE

There are material omissions and misstatements in petitioner's statement of the case which must be supplemented or corrected in order to comply with respondents' obligation under Rule 15.1 of this Court.

First, respondents note Footnote 1 of CSXT's statement of the case which implies that Louisiana's exemplary damage statute, La.Civ.Code art. 2315.3 has been repealed and may no longer affect the issues in this case. That implication is incorrect. The repeal of Article 2315.3 by its express terms does not apply to actions brought before the effective date of repeal. The accident in this case occurred in 1987. The repeal has no pertinent effect on the issues in this case.

Second, CSXT states that "plaintiffs' claims for state-law punitive damages rests solely on their allegation that CSXT's failure to inspect the tank car immediately and/or to receive the car from NOTC in person constitutes wanton and reckless conduct under Article 2315.3 of the Louisiana Civil Code." Petition, p. 6, B. Plaintiffs' Claim for Punitive Damages. On page 10 of its petition, under the caption **REASONS FOR GRANTING THE WRIT**, CSXT makes the statement that "Plaintiffs' punitive damage claim against CSXT is based solely on their allegation that CSXT breached an alleged duty to be present to immediately inspect the Tank Car upon its arrival at the interchange."

These statements of CSXT are belied by the allegations made by respondents in their petition. As reflected in the factual findings made by the Louisiana Court of Appeal, Pet.App. C1-C10, the subject tank car passed through the hands of several carriers prior to its arrival at CSXT's

interchange yard. After it was loaded with butadiene at Goodhope, Louisiana, the tank car was picked up by Illinois Central Railroad Company and transported to a point where it was transferred to New Orleans Terminal Company (NOTC) which then delivered it to CSXT's interchange yard. At some point in time the leakage of butadiene from the tank car commenced. That time has not been established for summary judgment purposes. What is known is that the tank car was delivered to the CSXT interchange at 7:25 p.m. in the evening before the explosion, that an unusual odor was detected in the interchange yard beginning at approximately 9:30 p.m., sufficient to cause nearby residents to report it to authorities, and that the leaking butadiene ignited and exploded at approximately 1:55 a.m. the following morning.

In their petition, respondents alleged the above facts and particularized fault on the part of all carriers for transporting the tank car and its hazardous cargo through and into a heavily populated area, and for maintaining it in that area without exercising the high degree of care placed upon them by Louisiana law. Respondents further alleged that one or more of these defendant carriers had the necessary *garde*[1] of the tank car and its contents, which under applicable Louisiana law was sufficient to impose strict liability for an unreasonable risk of harm.

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[1] *Garde* is the obligation imposed by Louisiana Law on the proprietor of a thing, or on one who avails himself of it, to prevent it from causing damage to others. The things in one's care are those things to which one bears such a relationship as to have the right of direction and control over them, and to draw some kind of benefit from them. King vs. Louviere, 543 So.2d 1327,1329 (LA.1989).

Specifically as to CSXT, respondents alleged that the owner of the interchange yard (now being determined to have been CSXT) incurred strict and/or absolute liability under applicable Louisiana law to persons or property in the vicinage of the interchange yard.

As to allegations of negligence, respondents alleged that each carrier defendant (which would include CSXT) failed to properly inspect the tank car at the times when it was in their respective possession or control, or at the times when they were under a duty to inspect the car, to assure that it was reasonably safe for the transportation of hazardous substances; that each failed to exercise the high degree of care imposed on it in the transportation of a hazardous chemical to prevent or minimize the chance of leakage, explosion and fire occurring; that the indicated carrier (which would include CSXT) failed to take appropriate action to remove the tank car from the heavily populated area, or otherwise respond, after it had notice of the imminent danger presented by the tank car and when it had reasonable opportunity to minimize that danger.

Thus the alleged failure to inspect the tank car, which appears to be the linchpin of CSXT's petition, is but one of the issues of fault and liability attributed by the respondents to CSXT.

In addition, respondents alleged that the circumstances of the incident demonstrate a compelling need for the design and implementation of an adequate system of monitoring the

interchange yard and the cars thereon to assure immediate attention and warning to nearby residents.[2]

Finally, on page 9 of the petition, under the caption D. Rulings below., CSXT refers to a ruling of the United States District Court in a parallel federal court proceedings arising out of the same fire as deciding that the "exact same basis of Plaintiffs' 2315.3 claim" has been found to have been preempted by federal law. This statement is misleading to the extent that it implies that the only basis for respondents' 2315.3 claim against CSXT had been found by the federal district judge to have been preempted by federal law in the cited Galjour case.[3] Reference to the entire statement in the federal court opinion, as set forth in Pet.App.E1-7, shows that while the district court found that "plaintiffs' state law negligence claims...are preempted," he also found that CSXT's "(f)ailure to prevent or minimize the leakage, explosion, and fire; delivering and spotting the car in a heavily populated area; and failing to take appropriate action to remove the tank car from the heavily populated area after notice of the imminent danger, are not preempted because the

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[2] These allegations were directed to the need for injunctive or other appropriate relief against the defendants found to be the owners and/or operators and/or users of the interchange. While not a specific allegation of fault, it nonetheless placed the carriers, including CSXT, on notice of a factual basis for the fault otherwise alleged in the petition, sufficient to permit evidence thereof in support of the specific fault allegations.

[3] Galjour v. General American Tank Car, No. 87-5003 (E.D. La. 12/12/91), Pet.App.E1-E7, was an independent action, brought and prosecuted separate and apart from the class action. The class action defendants' repeated efforts to obtain some sort of collateral estoppel flowing from the Galjour decisions have come to naught.

secretary has not promulgated regulations covering these subjects."[4]

SUMMARY OF ARGUMENT

CSXT has failed to prove, in support of its motion for summary judgment, lack of fault on its part that contributed to the cause of the explosion sued on in this class action, sufficient under Louisiana law to require the dismissal of the exemplary damage claim asserted against it. The federal regulation regarding forwarding of the tank car within a 48-hour period does not refer to when inspections should be made within that time. The federal regulation regarding the nature or extent of inspection of the tank car in question does not specify the time within which such inspection must be made. Having the custody and responsibility for the tank car sufficient to satisfy the *garde* requirements of Louisiana law, CSXT may be strictly liable or liable without fault for damages caused by its defective condition. If its conduct in that regard was sufficient to constitute reckless handling, storage or transportation of a hazardous substance, it may likewise be liable for exemplary damages. Neither actions would be preempted by FRSA because of the lack of any regulations covering such state-law delicts. Thus, the federal

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[4] While it is true that the federal district judge dismissed the state law claims "because the plaintiffs have submitted no evidence to support these claims," the federal procedure and Louisiana procedure governing summary judgment were at that time "vastly different," as noted by the state district judge in sustaining his denial of CSXT's motion. Pet.App. B3-4. This difference will be discussed further in this opposition.

issues in this action are neither conclusive nor preordained in the state court proceedings at its present stage, and certiorari should be denied.

ARGUMENT

A. Burden of Proof.

Under Louisiana law applicable to summary judgment procedure in effect at the time CSXT's motion was filed, the burden of showing that there is not a genuine issue of material fact in dispute is upon mover for summary judgment, and any doubt is resolved against granting of summary judgment and in favor of trial on the merits to resolve disputed facts. Thornhill v. Black, Sivalls & Bryson, Inc., 394 So.2d 1189 (La.1981). The contrast between summary judgment practice under Louisiana and federal law was drawn by the Louisiana Supreme Court in Sassone v. Elder, 626 So.2d 345, 351 (La.1983). Simply stated, the difference between the two is that in federal summary judgment practice, when the nonmoving party bears the burden of proof at trial, there is no genuine issue of material fact if the nonmoving party cannot come forward at the summary judgment stage with evidence of such sufficient quantity and quality for a reasonable juror to find the party can satisfy his substantive evidentiary burden. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

B. The Federal Regulations Relied Upon by CSXT.

CSXT maintains that the only issue determinative of CSXT's liability in this case pertains to its duty to inspect the tank car and to detect its leakage of the hazardous substance which caused the damages for which this action was brought.

In that regard, CSXT maintains that federal regulations promulgated under the Federal Railway Safety Act (FRSA), 45 U.S.C. §434, cited and quoted *verbatim* on pages 12-13 of the petition, preempted state law with regard to the duty to inspect, and since it, CSXT, complied with those regulations it can have no liability in this case.

The federal regulations cited by CSXT in support of its position are 49 C.F.R. §§ 174.14(a), 174.8(b), quoted verbatim on pages 15-16 of its petition.

Subsection 174.14(a) provides that a carrier at an interchange yard must forward each shipment of hazardous materials promptly and within 48 hours after acceptance at the originating point or receipt at the interchange point. In the case of CSXT, the shipment of butadiene was received at CSXT's interchange yard some nine hours before the explosion. Thus, CSXT reasons, since it had 48 hours within which to inspect the tank car, it had no duty to inspect it sooner. However, the cited regulation says nothing about inspection; it pertains only to forwarding.

Subsection 174.18(b) pertains only to what must be done when a train is required to be inspected. It says nothing about when such inspection must take place.

In sum, CSXT has not cited any federal regulation that exempts it from the duty to inspect the tank car at any given time while the tank car was in its possession and located on its property. Under the express provisions of FRSA §434, "A state may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement." The

absence of a regulation precludes preemption in such cases; nor can it be said that preemption may be implied in the absence of a regulation where there has be no Congressional intent to occupy the field exclusively or where the state law is in actual conflict with federal law. Freightliner Corporation v. Myrick, __U.S.___, 115 S.Ct. 1483, 1487, 131 L.Ed.2d 185 (1995).

C. Preemption of CSXT's Duty to Inspect.

CSXT does not dispute delivery of the subject tank car to its interchange yard. CSXT cannot dispute that under an arbitrated ruling by the Association of American Railroads Transportation Division Committee, regarding a dispute between CSXT and another railroad in an unrelated case involving the exact issue, interchange between NOTC and CSXT took place upon delivery and "makes the receiving road responsible for the cars, contents and car hire until any rejected cars are returned to the delivery road."[5]

Having the subject tank car in its possession and under its control, in a location on its property located in this heavily populated area within the City of New Orleans, CSXT was thereby exposed to liability in several respects.

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[5] This is contained in NOTC's opposition to CXST's motion for summary judgment in the trial court below. In view of CSXT's admission on page 7 of its petition that it "had received notice from NOTC that NOTC had placed the Tank Car on the interchange track," respondents will not burden this opposition with inclusion of NOTC's opposition and affidavit in support thereof, unless CSXT seeks to controvert the accuracy of respondents' recited summary.

While CSXT maintains that it had no duty to inspect the tank car before the lapse of 48 hours from delivery, its reliance on CSX Transportation, Inc. v. Easterwood, 507 U.S. 658, 1113 S.Ct.1732, 123 L.Ed.2d 387 (1993) is misplaced. The general rule in the context of this case, as enunciated by the Court in Easterwood, with paraphrasing supplied by brackets, is:

> "..the issue before the Court is whether the Secretary of Transportation has issued regulations covering the same subject matter as [Louisiana negligence law pertaining to the inspection of cars loaded with hazardous materials while located on a railroad interchange]. To prevail on the claim that the regulations have pre-emptive effect, petitioner must establish more than that they "touch upon" or "relate to" that subject matter.....for "covering" is a more restrictive term which indicates that pre-emption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law." Easterwood at 507 U.S. at 664. 1113 S.Ct. at 1738.

With regard to the preemptive effect of a federally-imposed speed limit on trains, the Court in Easterwood did not address whether preemption of speed would relieve the railroad defendant from liability for breach of other state-law duties such as responding to an evident and immediate hazard, apparently because of the concession of CSXT set forth in Footnote 15 of the opinion. Easterwood at 507 U.S. at 675, 1113 S.Ct. at 1743:

> "FN15. Petitioner is prepared to concede that the pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties,

> such as the duty to slow or stop a train to avoid a specific, individual hazard. Reply Brief for Petitioner in No. 91-790, p. 3. As respondent's complaint alleges only that petitioner's train was traveling too quickly given the "time and place," App. 4, this case does not present, and we do not address, the question of FRSA's pre-emptive effect on such related claims."

However, the Court's silence on this point may have been due to its agreement with the effect of the concession, for as stated by Mr. Justice Thomas in his concurrence in part and dissent in part:

> "Indeed, CSX admits that it shoulders a state-law duty to take measures against crossing accidents, including an "attempt to stop or slow the train if possible to avoid a collision." [FN1] Reply Brief for Petitioner in No. 91-790, p. 3. The Court effectively agrees, as is evident from its decision to limit its opinion to a common-law negligence action for excessive speed and from its refusal to address related state-law claims for the violation of a statutory speed limit or the failure to avoid a specific hazard." Easterwood at 507 U.S. at 676-677, 1113 S.Ct. at 1744.

In the case now before the Court, it is apparent that the federal regulations cited by and relied upon by CSXT simply do not operate to cover liability imposed by state law for failure to comply with the duty to inspect tank cars loaded with hazardous materials, delivered into its possession and placed on its property. That duty may arise actively or passively. The issues affecting the nature and extent of CSXT's duty of inspection during the crucial nine hour period, so as to create liability for the requisite compensatory

damages sufficient to bring Article 2315.3 into consideration have not been subject to adjudication, by motion for summary judgment or otherwise, in the sequencing orders of the Louisiana trial court. Petition, p. 8 and fn. 4 thereon.

D. Liability of CSXT Independent of Duty to Inspect.

Even if CSXT could convince the Louisiana trial court that it had no duty to inspect the tank car, or insufficient notice of a danger or time within which to make the inspection, Louisiana law applicable to strict liability arising solely from CSXT's *garde* of the tank or strict liability arising from the fact that the tank car was in its possession and on its property may be sufficient under Louisiana law to impose strict liability under Louisiana law.

Strict liability under Louisiana law, applicable to this case, encompasses all of the necessary elements sufficient to establish negligence except in one very important respect: notice or prior knowledge of the potentially harm-causing defect of the thing in the *garde* of the defendant. The Louisiana concept of *garde* and obligations flowing from it are succinctly discussed in King v. Louviere, 543 So.2d 1327, 1328-29 (La.1989). That prior lack of notice or knowledge of the defect and its potential danger is no defense to this strict liability was established under La.Civ.Code art. 2317, Opp.App.A, in the seminal Louisiana Supreme Court decision in Loescher v. Parr, 324 So.2d 446 (La.1975), stating the general rule applicable to this case:[6]

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[6] La. Civ. Code art. 2317, insofar as it has been interpreted to exclude prior notice or knowledge was repealed by the Louisiana legislature in 1996 with the provision that the repeal does not apply to actions arising prior to the repeal.

> "When harm results from the conduct or defect of a person or thing which creates an unreasonable risk of harm to others, a person legally responsible under these code articles for the supervision, care, or guardianship of the person or thing may be held liable for the damage thus caused, despite the fact that no personal negligent act or inattention on the former's part is proved. The liability arises from his legal relationship to the person or thing whose conduct or defect creates an unreasonable risk of injuries to others."

Likewise, under Louisiana law, the owner of property may be liable without fault to persons and property in the vicinage. In the interpretation of La.Civ.Code art 667, Opp.App.A, the Louisiana Supreme Court held in Hero Lands Co. v. Texaco, Inc., 310 So.2d 93, 97 (La.1975):

> "As expressed in the Article, the principle is a limitation the law imposes upon the rights of proprietors in the use of their property. It is a species of legal servitude in favor of neighboring property, an expression of the principle of *Sic utere*. An activity, then, which causes damage to a neighbor's property obliges the actor to repair the damage, even though his actions are prudent by usual standards. It is not the manner in which the activity is carried on which is significant; it is the fact that the activity cases damage to a neighbor which is relevant. (Citing case). The article expresses, as this Court has often stated, a doctrine of strict liability which does not depend upon deliction."

Facts alleged in respondents' petition in the state court

proceedings have not been controverted in this proceeding since the issues relating to compensatory damages have not been subject to summary judgment procedure in the sequencing order of the trial court. However, if the facts, when presented in the appropriate manner, support a claim for compensatory damages against CSXT in the above respects then the claim for exemplary damages would be ripe for adjudication, not before.

CONCLUSION

CSXT has failed to raise the implication of a controlling federal regulation promulgated under FRSA, which covers the allegations of liability, with or without fault, asserted against CSXT in the prosecution of the compensatory and exemplary damages issues now pending in Louisiana state court. Accordingly, there are no conclusive or preordained federal questions that have been presented to the Louisiana courts, much less adjudicated by the highest Louisiana court or finally adjudicated by the Louisiana intermediate court.

For these reasons, CSXT's petition for writ of certiorari should be denied.

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